Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ANTHONY SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois,
First District

PETITION FOR WRIT OF CERTIORARI

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(1a) QUESTIONS PRESENTED

1. A. Where, pursuant to a Terry-stop, absent objectively reasonable, specific, articulable facts from which a reasonably prudent officer in the same circumstances could conclude that defendant was "armed and dangerous," does the officer's mere subjective belief that is not thus objectively reasonable, justify the officer's action in removing defendant's hand from his pocket, resulting in seizure of contraband (drugs) - where defendant was on a City thoroughfare in broad daylight (noon), six (6) armed police officers were on the scene responding to a call of "street disturbance," and the only articulated facts were that defendant and about six (6) others being

investigated were Black males, one of whom (not defendant) was urinating in the street, and several of whom (also not defendant) were arguing loudly, and that defendant - who, per the officer, did not make any threatening statements or actions - failed to obey a police directive to "keep his hands in plain sight"?

B. In this situation, is the Fourth Amendment violated, requiring that the evidence thus obtained be suppressed?

C. Is it constitutionally permissible for police and/or the court to utilize defendant's race as a primary factor in the aforesaid objective inquiry and determination called for by Terry v. Ohio, 392 U.S. 1, and its progeny, most notably, Maryland v. Buie, 494 U.S. 325?

(1b) PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Anthony Smith, was the defendant in the Circuit Court of Cook County, appellant in the Appellate Court of Illinois, First Judicial District, and petitioner in the Supreme Court of Illinois.

Respondent, People of the State of Illinois, was the plaintiff in the Circuit Court, appellee in the Appellate Court of Illinois, and respondent in the Supreme Court of Illinois.

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1. There were no objectively reasonable, articulable facts, to warrant a reasonable officer similarly situated in believing defendant was "armed and dangerous" under constitutional standards of this Court

announced in Terry v. Ohio, 392 U.S. 1, and its progeny, including Maryland v. Buie, 494 U.S. 325.

Certiorari should be granted (A) so this Court can reiterate that police officers must have objectively reasonable (as opposed to merely subjective), articulable facts justifying the belief that defendant was "armed and dangerous," and further, (B) so this Court can announce that in determining whether police have articulable facts which justify a Fourth Amendment seizure, it is impermissible to place crucial reliance upon the factor of defendant's race.

Certiorari is especially appropriate to review the serious 4th Amendment issues raised here, in light of the

Stone v. Powell preclusion of federal habeas consideration of such issues.

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(1d) Judgment Below

The unpublished Order of the Appellate Court of Illinois, 1st District, No. 1-94-2013, is attached as Appendix A to this Petition.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No.

ANTHONY SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner, Anthony Smith, (hereafter, petitioner, or defendant), prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, First District, affirming the judgment (conviction and

sentence) of the Circuit Court of Cook County, Illinois, Criminal Division.

Judgment and Opinion Below

The unpublished Order of the Appellate Court of Illinois, First Judicial District, affirming the judgment of the Circuit Court, is set out as App. A.

The Modified Order Upon Denial of Petition for Rehearing of the Appellate Court of Illinois, First Judicial District, affirming the Circuit Court's judgment, is set out as App. B and is not reported.

The Order of the Illinois Supreme Court on April 3, 1996, denying defendant's Petition for Leave to Appeal to the Illinois Supreme Court, is set out as App. C and is not reported.

Jurisdictional Statement

On September 15, 1995, the Appellate Court of Illinois, First Judicial District (App. A), affirmed the judgment of the Circuit Court. A timely Petition for Rehearing was filed. On November 17, 1995, while still affirming, the Appellate Court modified its Order. (App. B) Petition for Leave to Appeal to the Supreme Court of Illinois, No. 80296, was denied on April 3, 1996. (App. C)

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. § 1257(a) and Rules 10.1, 12.1 and 13.1 of this Court.

Constitutional Provisions

The Fourth Amendment to the U.S. Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> "Section 1 ... No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws."

STATEMENT OF THE CASE

The Appellate Court found the facts to be as follows:

> "At the hearing on defendant's motion, Officer Carroll testified that he pulled defendant's arm out of his pocket and saw the contraband. Carroll acknowledged that he was not acting pursuant to a search or arrest warrant at the time, and that defendant had not consented to the taking.
>
> Under cross-examination by the State Officer Carroll testified that about noon on August 15, 1992, he and five other police officers responded to a call of a street disturbance at 701 North Kingsbury. When he arrived there, he saw defendant and about six other black males who ranged in age from 25 to 45 years. One of these men was urinating in the street and several others were arguing loudly. Carroll stated that he and the other officers attempted to quiet everyone and to restore the peace, and asked the men to keep their hands in plain sight. Everyone complied with this request except defendant, whom Carroll saw place his right hand into his jacket pocket.

Carroll testified that he felt threatened by defendant's action, and fearing for his safety, and that of his fellow officers and the others on the street, he then moved forward and pulled defendant's hand from his pocket. In doing so he discovered one clear plastic ziploc bag of crack cocaine.

On redirect examination, Carroll acknowledged that defendant was not involved in the argument, that he was not the person who was relieving himself on the street, and that defendant did not make any threatening statements to, or direct any such actions toward, him. Carroll stated that defendant was about seven to ten feet away from him when he saw defendant put his hand into his pocket, and although he (Carroll) was armed at the time, he did not have his weapon out when he approached him.

The court denied defendant's motion, finding under the circumstances presented, that Carroll had a right to pull defendant's hand out for the officer's safety and that the consequences of not taking that action were 'too grave.'" (App. 2-5)

RAISING THE FEDERAL QUESTION BELOW

In the Circuit Court, defendant raised the Fourth Amendment issue presented in this Petition, in a pre-trial motion to suppress, which the court denied after evidentiary hearing. (See App. A, pp. App. 2-5; App. B, pp. App. 15-18.) Defendant raised the issue as his sole point on direct appeal to the Appellate Court of Illinois (App. 2), which affirmed (App. 12), and again, on Petition for Rehearing (App. 19), which the Appellate Court denied. (App. 26-27) He again raised the issue in the Supreme Court of Illinois on leave to appeal, which was also denied. (App. C)

REASONS FOR GRANTING CERTIORARI

1.

There were no objectively reasonable, articulable facts, to warrant a reasonable officer similarly situated in believing defendant was "armed and dangerous" under constitutional standards of this Court announced in Terry v. Ohio, 392 U.S. 1, and its progeny, most notably, Maryland v. Buie, 494 U.S. 325.

Certiorari should be granted (A) so this Court can reiterate that police officers must specify objectively reasonable, articulable facts justifying the belief that defendant was "armed and dangerous," and (B) so this Court can announce that in determining whether police have articulable facts which justify a Fourth Amendment seizure, it is constitutionally impermissible to treat defendant's race as a crucial factor.

Certiorari is especially appropriate to review the serious 4th Amendment issues raised here, in light of the Stone v. Powell preclusion of federal habeas consideration of such issues.

Here, the only articulable fact asserted by the officer and accepted by

the State court to justify taking defendant's hand from his pocket, is that defendant had his hand in his pocket, and defendant and the other citizens on the street were Black.[1]

Here, the racial make-up of the defendant and the other persons on the street was a major factor, if not the determinative factor, in the officer's, the prosecutor's, and the State court's determinations that the officer's action - though based on no articulable facts -

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[1] The Appellate Court, in its summary of evidence, stated:

> "When he [Officer Carroll] arrived there, he saw defendant and about six other black males who ranged in age from 25 to 45 years." (App. 3)

The State, in its Brief, also pointed out that the persons on the street were black males. (St. Br. p. 4)

was constitutionally justified.

There were no other articulable circumstances to justify seizure of the defendant's property from his pocket.

The officer admitted:

> "Q: And what did you think was about to happen?
>
> A: I didn't know, ma'am. Just a gesture like that you never know. It might have been a reflex action on Mr. Smith's part; I don't know. I don't want to find out, either." (Tr. 10)

The officer testified:

> "Q: And he -- there is nothing about him other than he put his hands in his pocket that caused you to believe he was armed, correct?
>
> A: Correct, sir." (Tr. 12)

Race of defendant had to be the sole justification for the search of defendant. It is inconceivable to believe that the results here would be

the same if the group observed by the officer were comprised of six or seven **white** men. This incident occurred at 12:00 noon in broad daylight at a major thoroughfare in the City of Chicago. Defendant himself was doing nothing. The officer testified defendant did not make any threatening statements or take any threatening action toward him. Defendant was merely present, observing other people make fools of themselves - one urinating, and several others, arguing in a loud fashion. Surely, the six (6) armed police officers who came to the scene (App. 3) would have not ordered people to "keep their hands in plain sight" if this was in a white neighborhood at noon and some middle-class, white, stock-broker types were

arguing about baseball and one was doing something foolish behind the bushes.

RACE AS CONSTITUTIONALLY IMPERMISSIBLE FACTOR

This Court must define the meaning of "articulable circumstances" as set in Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889 (1968), to hold that the Constitution mandates that this standard cannot be met by consideration of the race of the citizens involved. This ban on race as a sole factor in the police decision to **stop** (as opposed to the decision to **search**) has already been imposed by this Court, in United States v. Brigoni-Ponce, 422 U.S. 873, 884-87, 45 L.Ed.2d 607, 618-20 (1975). "[S]uspicions based solely on the race of the person stopped cannot give rise to a reasonable suspicion justifying a

Terry stop." United States v. Anderson, 923 F.2d 450, 455 (6 Cir. 1991), *citing* Brigoni-Ponce, supra. Accord, Illinois Migrant Council v. Pilloid, 540 F.2d 1062, 1070 (7 Cir. 1976) (affirming grant of declaratory and injunctive relief against INS; street stoppages and interrogations of persons violated 4th Amendment because they were singled out by the INS agents solely because they looked like Mexicans or had Spanish surnames; *citing* Brigoni-Ponce). The present case is an ideal vehicle whereby this Court can extend the same logic to the police decision whether there are objectively reasonable, articulable facts justifying the police belief that a Terry-detainee is an "armed and dangerous" person so as to authorize a

protective search.

No Objectively Reasonable, Articulable Facts Are Present Here From Which a Reasonably Prudent Officer In the Same Circumstances Could Conclude That Defendant Was "Armed and Dangerous"

The conglomerate of the factors present in this case, demonstrates that there are no objectively reasonable, articulable facts here from which a reasonably prudent officer would be warranted in concluding that defendant was "armed and dangerous." This is evident from a survey of post-Terry decisions from this Court and from the federal Courts of Appeals construing the applicable, "objective" standard. That standard, as articulated by this Court in Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889 (1968), and further refined in Maryland v. Buie, 494 U.S. 325, 108

L.Ed.2d 276 (1990), requires the officer, **based on an objective and not merely a subjective standard, to reasonably believe, based on specific and articulable facts, that he is dealing with an armed and dangerous individual.**

In Terry, this Court held that in assessing the reasonableness of an officer's actions, "it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry, 392 U.S. at 21-22, 20 L.Ed.2d at 906.

The officer's subjective state of

mind, or his stated justification for his actions, is **not** the focus of the court's inquiry in determining the constitutionality of the officer's conduct. United States v. Rideau, 969 F.2d 1572, 1574 (5 Cir. 1992), *citing* Maryland v. Macon, 472 U.S. 463, 470-71, 86 L.Ed.2d 370, 378 (1985), Scott v. United States, 436 U.S. 128, 138-39, 56 L.Ed.2d 168, 178 (1978), and United States v. Colin, 928 F.2d 676, 678 (5 Cir. 1991).[2] In Macon, supra, this

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[2] Cf. United States v. Glen-Archila, 677 F.2d 809, 814-15, n.7 (11 Cir. 1982) (in context of justification for Coast Guard to stop foreign vessel on high seas for reasonable suspicion it is engaged in smuggling contraband into the United States - "[I]t is for the court, not a witness, ultimately to resolve whether, under the facts available to a law enforcement officer, the legal standard for reasonable suspicion was met.").

Court, quoting from Scott, supra, held:

> "Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' ... and not on the officer's actual state of mind at the time the challenged action was taken."

Accord, Rideau, 969 F.2d at 1574:

> "As long as all the facts and circumstances, viewed objectively, support the officer's decisions, the Fourth Amendment is satisfied. We [the court assessing those decisions] must attempt to put ourselves in the shoes of a reasonable police officer as he or she approaches a given situation and assesses the likelihood of danger in a particular context."

In Buie, this Court summarizes the law as it has developed since Terry, reminding that Terry authorizes only "a limited patdown for weapons where a reasonably prudent officer would be warranted in the belief, based on

'specific and articulable facts,' ... and not on a mere 'inchoate and unparticularized suspicion or 'hunch.' ... that he is dealing with an armed and dangerous individual." Buie, 494 U.S. at 332, 108 L.Ed.2d at 285, quoting from Terry, 392 U.S. at 21, 27, 20 L.Ed.2d at 906, 909. (Emphases added.) "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." Terry, 392 U.S. at 21 n.18, 20 L.Ed.2d at 906 n.18.

In making the necessary determination here, whether the officer violated the 4th Amendment when he pulled defendant's hand out of his pocket, one must consider the underpinnings of the

constitutional protection as applied to Terry frisks:

> "The Terry case is most instructive . . . . There we held that an on-the-street 'frisk' for weapons must be tested by the Fourth Amendment's general proscription against unreasonable searches because such a frisk involves 'an entire rubric of police conduct--necessarily swift action predicated upon the on-the-spot observations of the officer on the beat--which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.'... [Terry, 392 U.S. at 20, 20 L.Ed.2d at 905] We stated that there is '"no ready test for determining reasonableness other than by balancing the need to search ... against the invasion which the search ... entails."' Id., at 21 [20 L.Ed.2d at 905]." Buie, 494 U.S. at 331-32, 108 L.Ed.2d at 284, *quoting* Terry's quotation from Camara v. Municipal Court of San Francisco, 387 U.S. 523, 536-537, 18 L.Ed.2d 930, 938-40 (1967).

The lack of justification here is obvious when one compares the facts here

with those in cases where frisks were upheld on specific, articulable facts.

For example, in United States v. Michelletti, 13 F.3d 838 (5 Cir. 1994), where the stop-and-frisk that was upheld, was at 2 a.m. in a high crime area, the Court of Appeals stated:

> "The location in which suspicious behavior occurs, like the time of day, is among the facts that generate reasonable inferences as to the necessary police response to the behavior." Id. at 844.

At bar, of course, the incident was in broad daylight, at noon, and there was no testimony whatever about the Chicago public thoroughfare and/or the neighborhood being a "high crime area."

Similarly, in contrast to the present case, is United States v. Rideau, 969 F.2d 1572 (5 Cir. 1992) (*en banc*), where

the officer reasonably believed that defendant, who had been standing in the roadway at night in a high crime area, appeared to be intoxicated in public; and when the officer approached and asked defendant his name, "Rideau did not respond but appeared nervous and critically, backed away," id. at 1575, "a move which in this specific context was reasonably seen [by the officer] as threatening. [Officer] Ellison could reasonably believe that Rideau was gaining room to use a weapon." Ibid.

"In determining the reasonableness of the officer's conduct, 'due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw

from the **facts** in light of his experience.'" United States v. Holifield, 956 F.2d 665, 667 (7 Cir. 1992), *quoting* Terry, 392 U.S. at 27, 20 L.Ed.2d at 909. (Emphasis added.) True; yet, still, there must be **facts**.

In Holifield, where the search was held constitutionally valid,

> "At 9 P.M. on January 22, 1990, Officers Weismuller and Andrews were on a stake out in Milwaukee when they observed Holifield exit a nearby tavern, get into a car, and pull abruptly away from the curb. The car proceeded at a high rate of speed, and the officers followed in an unmarked squad car. The car was being driven recklessly around corners and rolled through a stop sign. The officers pulled the car over to give Holifield a citation for speeding.
>
> Before the officers had exited their squad car, Holifield exited his car and approached the squad car in a boisterous, aggressive manner. The officers exited the

> squad car with their weapons drawn. Holifield challenged the officers as to the reason for the stop." 956 F.2d at 666.
>
> "The officers could have had a reasonable belief that Holifield presented a danger to themselves and others. Their belief was not based upon a 'hunch' but upon Holifield's boisterous, aggressive approach to the squad car. Officer Weismuller testified that it is unusual for a driver to exit his or her vehicle upon being stopped. The officers exited their squad car with their weapons drawn, thus evidently deeming Holifield's approach threatening. Holifield's **aggressive actions, the time of night, his reckless driving, and the fact that he had just exited a tavern** could lead a reasonably prudent officer to believe that his safety was in danger. Thus, the pat-down of Holifield was reasonable . . . ." Id. at 667. (Emphasis added.)

The "central requirement" of Terry is that the Constitution requires "individualized suspicion" and authorizes a patdown only under the

limited circumstances as outlined above. (See quotes from Terry and Buie, supra.)

As Mr. Justice Brennan, with whom Mr. Justice Marshall joined, dissenting in United States v. Martinez-Fuerte, 428 U.S. 543, 567, 49 L.Ed.2d 1116, 1134 (1976),[3] put it:

> "[E]ven in the exceptional situations permitting intrusions on less than probable cause, it has long been settled that justification must be measured by objective standards." 428 U.S. at 569, 49 L.Ed.2d at 1135.

After quoting thus from Terry, 392 U.S. at 21-22, 20 L.Ed.2d at 906:

> "'The scheme of the Fourth Amendment becomes meaningful only

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[3] The majority, per Mr. Justice Powell, held "that stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant." 428 U.S. at 566, 49 L.Ed.2d at 1133.

> when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached mental scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard . . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.'" Id. at 569, 49 L.Ed.2d at 1135,

Justice Brennan goes on to reiterate what we here today espouse:

> "Terry thus made clear what common sense teaches: Conduct, to be reasonable, must pass muster under objective standards applied to specific facts." Ibid.

As demonstrated, here, there are no specific, objectively reasonable, articulable facts to justify the

officer's belief that defendant was an "armed and dangerous" individual.

* * *

Certiorari should be allowed so this Court may clarify the requirements of the "objective" standard of Terry as interpreted and applied in Buie, and also to preclude reliance by police and by the courts on a defendant's race as a permissible Terry factor.

* * *

Certiorari is especially appropriate to review the serious Fourth Amendment issues raised here, in light of the preclusion of federal habeas consideration of such issues. Stone v. Powell, 428 U.S. 465, 49 L.Ed.2d 1067 (1976). See separate opinion of Mr. Justice Marshall, with whom Mr. Justice

Brennan joined, concurring in Mincey v. Arizona, 437 U.S. 385, 402, 57 L.Ed.2d 290, 306 (1978):[4]

> "I join the opinion of the Court, which holds that petitioner's rights under the Fourth and Fourteenth Amendments have been violated. I write today to emphasize a point that is illustrated by the instant case, but that applies more generally to all cases in which we are asked to review Fourth Amendment issues arising out of state criminal convictions.
>
> It is far from clear that we would have granted certiorari solely to resolve the involuntary statement issue in this case, for that could have been resolved on federal habeas corpus. With regard to the Fourth Amendment

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[4] The Court, *inter alia*, unanimously struck down Arizona's "murder scene exception" to the warrant requirement as "inconsistent with the Fourth and Fourteenth Amendments ...." Id. at 395, 57 L.Ed.2d at 302. It also held that due process required exclusion of defendant's involuntary statements. Id. at 401-02, 57 L.Ed.2d at 306.

> issue, however, we had little choice but to grant review, because our decision in Stone v Powell, 428 US 465, 49 L Ed 2d 1067 ... (1976) precludes federal habeas consideration of such issues. . . . . Because of this holding, petitioner would not have been able to present to a federal habeas court the Fourth Amendment claim that the Court today unanimously upholds." Id. at 402-03, 57 L.Ed.2d at 306-07.

The concurring Justices further pointed out how important it is for this Court to exercise its certiorari jurisdiction to redress Fourth Amendment violations:

> "Prior to Stone v Powell, there would have been no need to grant certiorari in a case such as this, since the federal habeas remedy would have been available to the defendant. . . . But Stone eliminated the habeas remedy with regard to Fourth Amendment violations, thus allowing state-court rulings to diverge from lower federal-court rulings on these issues and placing a correspondingly greater burden on this Court to ensure uniform federal law in the Fourth

> Amendment area [via exercise of certiorari jurisdiction]." Id. at 404, 57 L.Ed.2d at 307-08.

* * *

It is imperative that this Court "ensure uniform federal law in the Fourth Amendment area" by (a) enforcing the "objective" standard based on specific, articulable facts to justify a search without probable cause in the Terry context; and (b) excluding as constitutionally impermissible, a defendant's "race" as a determinative factor. Granting certiorari in this case will serve these laudatory purposes, while at the same time vindicating defendant's Fourth Amendment rights, which were trashed by the Chicago police and the Illinois courts in this case.

CONCLUSION

For any and all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDICES

APPENDIX A

FIFTH DIVISION
September 15, 1995

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-94-2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 92 CR 27917
ANTHONY SMITH,	)	Honorable James D. Egan, Judge Presiding.
Defendant-Appellant.	)	

O R D E R

Following a stipulated bench trial in the circuit court of Cook County, defendant was found guilty of possession of a controlled substance and sentenced to two years imprisonment. On appeal, defendant contends that the trial court erred in denying his motion to suppress evidence.

Defendant was charged with this narcotics offense after Chicago police officer Edward Carroll recovered a packet of crack cocaine from his jacket pocket on August 15, 1992. Prior to trial defendant filed a motion to suppress that evidence, claiming that its seizure was made in violation of his Fourth Amendment rights.

At the hearing on defendant's motion, Officer Carroll testified that

he pulled defendant's arm out of his pocket and saw the contraband. Carroll acknowledged that he was not acting pursuant to a search or arrest warrant at the time, and that defendant had not consented to the taking.

Under cross-examination by the State Officer Carroll testified that about noon on August 15, 1992, he and five other police officers responded to a call of a street disturbance at 701 North Kingsbury. When he arrived there, he saw defendant and about six other black males who ranged in age from 25 to 45 years. One of these men was urinating in the street and several others were arguing loudly. Carroll stated that he and the other officers attempted to quiet everyone and to

restore the peace, and asked the men to keep their hands in plain sight. Everyone complied with this request except defendant, whom Carroll saw place his right hand into his jacket pocket. Carroll testified that he felt threatened by defendant's action, and fearing for his safety, and that of his fellow officers and the others on the street, he then moved forward and pulled defendant's hand from his pocket. In doing so he discovered one clear plastic ziploc bag of crack cocaine.

On redirect examination, Carroll acknowledged that defendant was not involved in the argument, that he was not the person who was relieving himself on the street, and that defendant did not make any threatening statements to,

or direct any such actions toward, him. Carroll stated that defendant was about seven to ten feet away from him when he saw defendant put his hand into his packet, and although he (Carroll) was armed at the time, he did not have his weapon out when he approached him.

The court denied defendant's motion, finding under the circumstances presented, that Carroll had a right to pull defendant's hand out for the officer's safety and that the consequences of not taking that action were "too grave." The parties then stipulated to the testimony which had been presented at the hearing on the motion, and to the laboratory results which showed that the substance recovered from defendant was 2.24 grams

of crack cocaine.

In this appeal from the judgment entered on that evidence, defendant contests solely the propriety of the court's denial of his motion to suppress evidence. We note initially that the trial court's determination on such a motion to will not be disturbed on review unless it is against the manifest weight of the evidence. People v. Janis (1990), 139 Ill. 2d 300, 308, 565 N.E.2d 633.

Under the ruling of Terry v. Ohio (1968), 392 U.S. 1, 88 S. Ct. 1868, and its codification in this State (725 ILCS 5/107-14 (West 1992)), a police officer may make a valid investigatory stop absent probable cause for arrest provided that the officer is able to

point to specific and articulable facts which, taken together with reasonable inferences drawn from the officer's experience, would reasonably warrant the investigative intrusion. An officer may also conduct a pat-down search of the individual if he has reason to believe that he is dealing with an armed and dangerous individual and that the safety of himself or others is at risk. (See 725 ILCS 5/108-1.01 (West 1992); People v. Smithers (1980), 83 Ill. 2d 430, 434-35, 415 N.E.2d 327.) The focus of this appeal is the propriety of the seizure which took place during the course of the police investigation of the street disturbance and led to the discovery of the contraband, rather than the propriety of the initial stop for which

there also appears to be ample support in the record. See People v. Murray (1990), 137 Ill. 2d 382, 387-88, 560 N.E. 2d 309.

It is well-settled that the right to frisk does not automatically follow the right to stop; its sole justification is the protection of the officers or others nearby, and not the gathering of evidence. (People v. Galvin (1989), 127 Ill. 2d 153, 165, 170, 535 N.E.2d 837.) In order to undertake such a search for weapons, the police officer need not be certain that the subject is armed; it is sufficient if a reasonably prudent person would be warranted in believing under the circumstances presented that his safety or that of others was in danger.

(People v. Kantowski) (1983), 98 Ill. 2d 75, 80, 455 N.E.2d 1379 citing (Terry v. Ohio.) The officer's conduct must satisfy the fourth amendment requirement of reasonableness which, in turn, depends on the facts and circumstances of each case. (People v. Smithers, 83 Ill. 2d at 434-5, 415 N.E.2d 327.) These factors are judged against an objective standard which takes into account the specific reasonable inferences the officer may draw from the situation before him in light of his experience (People v. Christensen (1990), 198 Ill. App. 3d 168, 172, 555 N.E.2d 746 (citing Terry v. Ohio), and are to be considered from the vantage point of a reasonable officer confronting them in the performance of

his duties, rather than from the perspective of analytical hindsight. People v. Smithers, 83 Ill. 2d at 439, 415 N.E.2d 327.

The record here shows that when Officer Carroll and several other officers responded to a call of a street disturbance at the designated location, they observed a group of men, some of whom were engaged in unruly behavior. In the course of restoring order and quiet to the area, they asked these men to keep their hands in plain sight. Everyone complied with this directive except defendant who put his hand into his coat pocket. When Officer Carroll observed this move, he feared for his safety and that of the others nearby and moved forward to take defendant's hand

out. The court found under the circumstances presented that Officer Carroll had a right to take that action for his own safety and denied defendant's motion to suppress the evidence which was uncovered in the process. After reviewing the record and the above-cited authority, we cannot say that the court's decision was against the manifest weight of the evidence.

As with all fourth amendment situations, the reasonableness of a seizure depends upon a balancing of the interest of the public and the interest of the individual's right to personal security free from arbitrary interference by law officers. (People v. Smithers, 83 Ill. 2d at 434, 415 N.E.2d 327.) In this case we believe

that balance was maintained by the officer's quick and limited response to the situation presented by defendant's conduct in going into his coat pocket which the court properly construed as a justifiable protective measure based on the officer's reasonable concern for his safety. See People v. Christensen, 198 Ill. App. 3d at 173-74, 555 N.E.2d 746; see also People v. Pittman (1984), 126 Ill. App. 3d 586, 593, 467 N.E.2d 918.

We therefore affirm the judgment of the circuit court of Cook County. Pursuant to People v. Nicholls (1978), 71 Ill. 2d 166, 374 N.E.2d 194, we grant the State's request that defendant be assessed $100 as costs for the State's defense of this appeal and incorporate it as part of our judgment.

Judgment affirmed.

GORDON, J., with COUSINS, Jr., P.J., and McNULTY, J., concurring.

APPENDIX B

FIFTH DIVISION
November 17, 1995

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-94-2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 92 CR 27917
ANTHONY SMITH,	)	Honorable James D. Egan,
Defendant-Appellant.	)	Judge Presiding.

MODIFIED ORDER UPON DENIAL OF PETITION FOR REHEARING

Following a stipulated bench trial in the circuit court of Cook County, defendant was found guilty of possession of a controlled substance and sentenced to two years imprisonment. On appeal, defendant contends that the trial court erred in denying his motion to suppress evidence.

Defendant was charged with this narcotics offense after Chicago police officer Edward Carroll recovered a packet of crack cocaine from his jacket pocket on August 15, 1992. Prior to trial defendant filed a motion to suppress that evidence, claiming that its seizure was made in violation of his fourth amendment rights.

At the hearing on defendant's motion, Officer Carroll testified that

he pulled defendant's arm out of his pocket and saw the contraband. Carroll acknowledged that he was not acting pursuant to a search or arrest warrant at the time, and that defendant had not consented to the taking.

Under cross-examination by the State, Officer Carroll testified that about noon on August 15, 1992, he and five other police officers responded to a call of a street disturbance at 701 North Kingsbury. When he arrived there, he saw defendant and about six other black males who ranged in age from 25 to 45 years. One of these men was urinating in the street and several others were arguing loudly. Carroll stated that he and the other officers attempted to quiet everyone and to

restore the peace, and asked the men to keep their hands in plain sight. Everyone complied with this request except defendant, whom Carroll saw place his right hand into his jacket pocket. Carroll testified that he felt threatened by defendant's action, and fearing for his safety, and that of his fellow officers and the others on the street, he then moved forward and pulled defendant's hand from his pocket. In doing so he discovered one clear plastic bag of crack cocaine.

On redirect examination, Carroll acknowledged that defendant was not involved in the argument, that he was not the person who was relieving himself on the street, and that defendant did not make any threatening statements to,

or direct any such actions toward, him. Carroll stated that defendant was about seven to ten feet away from him when he saw defendant put his hand into his pocket, and although he (Carroll) was armed at the time, he did not have his weapon out when he approached him.

The court denied defendant's motion, finding under the circumstances presented, that Carroll had a right to pull defendant's hand out for the officer's safety and that the consequences of not taking that action were "too grave." The parties then stipulated to the testimony which had been presented at the hearing on the motion, and to the laboratory results which showed that the substance recovered from defendant was 2.24 grams

of crack cocaine.

In this appeal from the judgment entered on that evidence, defendant contests solely the propriety of the court's denial of his motion to suppress evidence. Defendant maintains that since neither the facts nor the credibility of the witnesses are at issue, de novo review is required.

In People v. Foskey (1990), 136 Ill. 2d 66, 76, 554 N.E.2d 192, the supreme court observed that:

> "Ordinarily, the decision of a trial court on a motion to quash and suppress will not be disturbed by a reviewing court unless that finding is determined to be clearly erroneous [Citations]. When neither the facts nor the credibility of the witnesses is questioned, however, the issue of whether exigent circumstances were present is a legal one and this court will consider the question de

novo. [Citation]."

Thereafter, the supreme court deemed de novo review appropriate in considering an issue of probable cause (In re D.G. (1991), 144 Ill. 2d 404, 408-09, 581 N.E.2d 648), and the application of the "plain-touch" doctrine in People v. Mitchell (1995), 165 Ill. 2d 211, 230, 650 N.E.2d 1014. We note that in People v. Hendrix (1993), 250 Ill. App. 3d 88, 96-98, 620 N.E.2d 1176, and People v. Stoddard (1993), 256 Ill. App. 3d 989, 993-95, 628 N.E.2d 234, strong argument was made to apply the clearly erroneous standard to probable cause and to limit the holding of the supreme court requiring a de novo standard to the facts in People v. Foskey, involving exigent circumstances. However, such a

narrow application is difficult in light of In re D.G. and People v. Mitchell.

Nevertheless, we find the result in this case to be the same under either standard. Under the ruling of Terry v. Ohio (1968), 392 U.S. 1, 88 S. Ct. 1868, and its codification in this State (725 ILCS 5/107-14 (West 1992)), a police officer may make a valid investigatory stop absent probable cause for arrest provided that the officer is able to point to specific and articulable facts which, taken together with reasonable inferences drawn from the officer's experience, would reasonably warrant the investigative intrusion. An officer may also conduct a pat-down search of the individual if he has reason to believe that he is dealing with an armed and

dangerous individual and that the safety of himself or others is at risk. (See 725 ILCS 5/108-1.01 (West 1992); People v. Smithers (1980), 83 Ill. 2d 430, 434-35, 415 N.E.2d 327.) The focus of this appeal is the propriety of the seizure which took place during the course of the police investigation of the street disturbance and led to the discovery of the contraband, rather than the propriety of the initial stop for which there also appears to be ample support in the record. See People v. Murray (1990), 137 Ill. 2d 382, 387-88, 560 N.E.2d 309.

It is well-settled that the right to frisk does not automatically follow the right to stop; its sole justification is the protection of the

officers or others nearby, and not the gathering of evidence. (People v. Galvin (1989), 127 Ill. 2d 153, 165, 170, 535 N.E.2d 837.) In order to undertake such a search for weapons, the police officer need not be certain that the subject is armed; it is sufficient if a reasonably prudent person would be warranted in believing under the circumstances presented that his safety or that of others was in danger. (People v. Kantowski (1983), 98 Ill. 2d 75, 80, 455 N.E.2d 1379 (citing Terry v. Ohio.) The officer's conduct must satisfy the fourth amendment requirement of reasonableness which, in turn, depends on the facts and circumstances of each case. (People v. Smithers, 83 Ill. 2d at 434-5.) These factors are

judged against an objective standard which takes into account the specific reasonable inferences the officer may draw from the situation before him in light of his experience (People v. Christensen (1990), 198 Ill. App. 3d 168, 172, 555 N.E.2d 746 (citing Terry v. Ohio), and are to be considered from the vantage point of a reasonable officer confronting them in the performance of his duties, rather than from the perspective of analytical hindsight. People v. Smithers, 83 Ill. 2d at 439.

The record here shows that when Officer Carroll and several other officers responded to a call of a street disturbance at the designated location, they observed a group of men, some of

whom were engaged in unruly behavior. In the course of restoring order and quiet to the area, they asked these men to keep their hands in plain sight. Everyone complied with this directive except defendant who put his hand in to his coat pocket. When Officer Carroll observed this move, he feared for his safety and that of the others nearby and moved forward to take defendant's hand out. The court found under the circumstances presented that Officer Carroll had a right to take that action for his own safety and denied defendant's motion to suppress the evidence which was uncovered in the process. After reviewing the record and the above-cited authority, we find no error in the court's decision.

As with all fourth amendment situations, the reasonableness of a seizure depends upon a balancing of the interest of the public and the interest of the individual's right to personal security free from arbitrary interference by law officers. (People v. Smithers, 83 Ill. 2d at 434.) In this case we believe that balance was maintained by the officer's quick and limited response to the situation presented by defendant's conduct in going into his coat pocket which the court properly construed as a justifiable protective measure based on the officer's reasonable concern for his safety. See People v. Christensen, 198 Ill. App. 3d at 173-74; see also People v. Pittman (1984), 126 Ill. App. 3d 586,

593, 467 N.E.2d 918.

We therefore affirm the judgment of the circuit court of Cook County. Pursuant to People v. Nicholls (1978), 71 Ill. 2d 166, 374 N.E.2d 194, we grant the State's request that defendant be assessed $100 as costs for the State's defense of this appeal and incorporate it as part of our judgment.

Judgment affirmed.

GORDON, J., with COUSINS, Jr., P.J., and McNULTY, J., concurring.

APPENDIX C

80296

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

April 3, 1996

Mr. Frederick F. Cohn
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205 W. Wacker Dr., S#1515
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No. 80296 - People State of Illinois, respondent, v. Anthony Smith, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 25, 1996.